No. 87-888

Supreme Court, U.S.
FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN J. RAFFERTY, Superintendent, Rahway State Prison, and IRWIN I. KIMMELMAN, the Attorney General of the State of New Jersey,

Petitioners.

vs.

RUBIN CARTER and JOHN ARTIS,

Respondents.

CHRISTOPHER DIETZ, Chairman, Parole Board of the State of New Jersey, and IRWIN I. KIMMELMAN, the Attorney General of the State of New Jersey,

Petitioners.

vs.

JOHN ARTIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari on the question of whether materiality determinations made by a state court relating to the exercise of judgment as to whether a *Brady* violation undermined confidence in the outcome of the proceedings, is a factual question subject to the presumption of correctness, in the face of the fact that precisely the same issue was held by this Court to be a mixed question of law and fact in the context of an ineffectiveness claim and every federal court that has considered the issue has found it to be a mixed question?

2. Should this Court review a 92-volume, 20,000 page record to review a finding that a material violation of *Brady* occurred, which finding was made by a unanimous Court of Appeals and the District Court which granted a writ of habeas corpus?

3. Should this Court review a superfluous issue relating to the failure to file a Notice of Appeal with respect to one Respondent whose writ of habeas corpus was granted on the merits in any event?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Preliminary Statement

Petitioners present a narrow and sanitized version of the 21-year history of this controversial case, suggesting that this is an instance where federal courts overturned the state conviction of an obviously-guilty party as a result of some inadvertent technical violation. The reality, however, is otherwise. A unanimous Court of Appeals and the District Court agreed with, and quoted verbatim, the strongly-worded conclusion of the three dissenting justices of the New Jersey Supreme Court, that the State withheld from the defense evidence which had

> the real capacity ... to bring about the utter destruction of by far the most important witness in the State's arsenal, with the fallout ... casting doubt on the tactics of the prosecution [.] *State v. Carter*, 91 N.J. 86, 139, 449 A.2d 1280, 1309 (1982) (Clifford, J., dissenting).

Carter v. Rafferty, 826 F.2d 1299, 1309 (3rd Cir. 1987), (Pet. App. 20a)*; *Carter v. Rafferty*, 621 F.Supp. 533, 548 (D.C.N.J. 1985), (Pet. App. 53a).

The federal courts here have fulfilled the ultimate purpose of the habeas corpus writ, namely, as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty," *Stone v. Powell*, 428 U.S. 465, 491-92, n. 31 (1976). At every step of this tortured case, respondents have adamantly asserted their complete innocence of the charges and have vigorously pursued their remedies through the state and federal courts, presenting substantial evidence to show that they were in fact innocent and that they were found guilty only because of serious constitutional errors at trial. Respondents' position has been repeatedly endorsed by reviewing courts.

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* The following citation abbreviations are used: "Pet." for the Petition for a Writ of Certiorari; "Pet. App." for the Appendix to the Petition; and "A.____" for the joint appendix in the Court below.

The first trial was marked by the prosecution's manipulation of its two principal witnesses, Bello and Bradley, their perjury, and the massive suppression of exculpatory evidence, culminating in the New Jersey Supreme Court's unanimous reversal of the 1967 verdict on *Brady* grounds. See *State v. Carter*, 69 N.J. 420, 354 A.2d 627 (1976).

The second trial likewise depended on the prosecution's continued use and manipulation of the monumentally untrustworthy Bello -- "hardly a model of rectitude to begin with", according to the New Jersey Supreme Court. *State v. Carter*, 85 N.J. 300, 307, 426 A.2d 501 (1981). Bello was the only witness in the 1976 retrial to claim respondents were at the scene, and the Prosecutor conceded that without his testimony, the State had "a weak *prima facie* case." (A.3C667) Yet between the two trials, Bello had given numerous sworn contradictory versions of where he was and who and what he saw. The post-trial revelations concerning the role of erroneous polygraph results in the molding of Bello's testimony for the second trial definitively demonstrated his absolute unreliability and malleability. As expressed by the three dissenting New Jersey Supreme Court justices:

> A more egregious *Brady* violation than the one presented by this case is difficult to imagine. ...the State withheld from the defendants material evidence favorable to them in connection with the Harrelson polygraph and, unknown to defendants and their counsel, compounded the error by using the mistaken and erroneous polygraph to get the prime witness against the defendants to change his story again and go back to his original testimony given at the first trial. That all adds up to a deprivation of due process and requires a reversal of defendants' convictions.

State v. Carter, 91 N.J. at 133 (Pet. App. 124a). The District Court (Pet. App. 50a-74a) and the Court of Appeals for the Third Circuit (Pet. App. 3a-21a) reached the same conclusion.

These courts also noted the sharp dispute over the evidence (Pet. App. 19a-20a, 65a-74a). According to the District Court, which carefully reviewed the voluminous record (the appendix in the Third Circuit alone consisted of 92 volumes and 20,000 pages),

every element of the State's case was "frayed" and "substantially called into question" (Pet. App. 66a, 74a). The *Brady* information was thus material not only in light of the centrality of Bello's testimony, but also because of the fragility of the State's case against respondents as a whole.

The retrial also featured the prosecution's introduction of the unconstitutional and totally unfounded theory of racial revenge which the District Court ruled a separate basis for the grant of the writs of habeas corpus (see Pet. App. 31a-50a), but which was not examined by the Third Circuit and is not under review at this time. That ruling would require the grant of the writs even if the Court adopted petitioners' position on the questions presented here. This racial motive theory, with no basis in the facts or the law, necessarily obscured the glaring weaknesses in the State's case.

Given that this Court's function is not to reexamine facts already scrutinized so carefully by the courts below, petitioners now resort to the contention that a novel legal issue is presented in the decision below; namely, whether a state court's conclusion that a *Brady* violation was not material is subject to a presumption of correctness under 28 U.S.C. § 2254(d). That question, however, was resolved by *Strickland v. Washington*, 466 U.S. 668, 698 (1984), where this Court, without a single dissenting vote on this point, held that "a state court conclusion that counsel rendered effective asistance is not a finding of fact binding on the federal court" under the statutory presumption; the presumption applies neither to the "performance" nor to the "prejudice" part of the test. Since under *United States v. Bagley*, 105 S. Ct. 3375 (1985), precisely the same legal test on prejudice applies to both ineffectiveness claims and *Brady* violations, the ultimate judgment whether a *Brady* violation "undermined confidence in the outcome" cannot be considered a factual question, subject to the statutory presumption. The very nature of a "materiality" determination — whether, in the light of what might have happened at the trial had the exculpatory evidence been revealed, the verdict would have been the same — shows that a reviewing court is applying judgment, often difficult judgment, to what *should* have happened at the trial rather than what *did* happen. In no sense could that be considered an "historical fact" to which the statutory presumption applies. Furthermore, all the federal courts that have examined this issue

have agreed: materiality is not a factual question, but a legal conclusion not subject to the presumption of correctness. Indeed, as the District Court pointed out, even the state courts in this case have treated it as such (Pet. App. 61a).

The other questions presented are so fact-dependent that they cannot serve as the basis for the grant of a writ here under this Court's rules, as indicated below.

Statement of the Facts

The two victims who survived the shootings and described the assailants, never identified respondents. One of the victims even selected photographs of two other men as the assailants. Even though respondents were brought to the scene by police shortly after the shootings, no witness (including Bello) identified them.[1] All contemporaneous descriptions of the perpetrators and their clothing were consistent and in no way described Carter and Artis. That no one identified respondent Carter is especially significant since he was such a well-known sports figure in his hometown of Paterson and so easily recognizable by his trademark bald head and beard. The police repeatedly stated that the gunmen did not have beards. As the chief investigating officer told the grand jury which exonerated respondents, "the physical description of the two holdup men is not even close [to Carter and Artis]". (Pet.App. 68a)

The State had no case until October 1966, four months after the shootings, when Bello "involved in other criminal charges, provided evidence directly incriminating the defendants." 85 N.J. at 306. This "evidence" was secured by continued police pressure on and inducements to Bello during this period, which undermine the competence and voluntariness of his identification. Bello was aware that if he did not identify Carter and Artis, then the police were interested in him as a suspect involved in this crime (A. 20A4531-32). They kept him in custody (against his will, according to an affidavit) prior to the first trial. He was not

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[1] Originally Bello identified no one to the police and, in fact, had described two men (both thin build, 5'11") who did not resemble respondents. Victim Marins described both gunmen as light-complexioned Negroes, thin build, about six feet tall, and no beards. Carter had a prominent beard, was 5'7", with a very dark complexion and stocky build (Pet. App. 67a-69a).

charged with various crimes he committed, nor was his parole revoked; the prosecutors interceded with judges and arresting officers for him on other criminal charges, and sought to get him a $10,000 reward. (Pet. App. 67a-68a)[2]

Bello testified in 1967 that he was "on the street" walking towards the Lafayette Bar when the shootings occurred, having just completed a burglary nearby; after hearing the shots, he saw two tall, thin "colored" men coming around the corner and walking down the street towards him; he ducked into an alley and saw a car speed away. 85 N.J. at 305.

The Brady Context

The State's case began to unravel in 1974 when both Bradley and Bello independently recanted and swore they did not see and could not identify anyone as the gunmen.[3] 85 N.J. at 306; Pet. App. 26a-27a. Bradley stood by his recantation and never reappeared as a witness. Bello began a convoluted journey before various tribunals prior to the 1976 retrial. He changed his story, under oath, time after time, adding details here, remembering this, not remembering that, "revising his story until it became unrecognizable" (Pet. App. 50a). These new stories, however, had a common nucleus: instead of being "on the street" when the shots rang out, he was "in the bar". In some versions he saw two persons do the killings — not Carter and Artis — but saw the latter outside the bar afterwards (Pet. App. 5a-6a). But the State did not accept the "in the bar" story given by Bello since it flatly contradicted his 1967 "on the street" story and raised serious questions (if "in the bar" when the shootings began, where did he hide,

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[2] Suppression of a taperecording made of the key October police interview showing that Bello's inability to identify respondents and their car was overcome by his susceptibility to police pressure and suggestion was a ground for the unanimous reversal of the 1967 verdicts. See 69 N.J. at 432.

[3] In 1973, Bello had sought help at a clinic for alcoholism. He told his psychiatrist that he was in the bar at the time of the shootings and that two "colored" men — not Carter and Artis — were the gunmen (A. 20A4535-4537; 2F197-198). At the 1976 trial, Bello said he had revealed this account to his psychiatrist to explain why he was drinking so heavily and to facilitate his treatment (A. 23A4977-4978). Contrary to the State's assertions (Pet. App. 60a), Bello's recantation and in-the-bar stories originated with Bello himself.

why wasn't he shot, what was his involvement, what could he have seen, etc.). The State arranged a polygraph, one purpose of which, as the Prosecutor testified, was to settle the question of where Bello was during the shootings (Pet. App. 51a, 125a).

Bello told the polygrapher, Leonard Harrelson, *inter alia*, that he was "in the bar" when the shootings occurred and saw respondents outside afterwards.[4] He concluded that Bello was telling the truth and told the prosecutors that, in his opinion, the "in the bar" story was true. The prosecution vigorously argued with him, rejecting his conclusion and insisting the in-the-bar story was impossible. Harrelson insisted he was correct, that his finding was not tentative or preliminary, and would not change upon further review.[5] (Pet. App. 6a, 51a-52a, 99a, 125a) Harrelson repeated his position in a lengthy conversation with the Prosecutor four days later. Despite the polygrapher's firm conclusion, the prosecutors — recognizing the disastrous consequences of trying the case with a story that would have proven Bello's first trial testimony was a lie — proceeded to keep Bello in custody and indoctrinate him exclusively with his first trial on-the-street story (A. 1C142-43, 159-63). (These and related events were first revealed in 1981 at the remand hearing, and show the prosecution's singleminded determination to get Bello back to the 1967 story regardless of what the polygraph showed.)

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[4] Bello also told Harrelson he did *not* see Carter or Artis in the bar, but he did see another man — one of the gunmen — going around a pole just as he heard the shots (A. 2C437-438), corresponding exactly to where and when victim Marins saw one of the gunmen. Bello also told Harrelson of the presence of two other witnesses at the bar at that time. Unknown to respondents, all of the above were found by Harrelson to be "the truth"; yet at trial Bello specifically denied (a) seeing any gunman in the bar; (b) the presence of these two other witnesses; and (c) being in the bar himself. (The Prosecutor in summation ridiculed the very idea of Bello being in the bar.)

[5] Three prosecutors swore under oath that Harrelson told them his oral reports were only "preliminary", "tentative" and subject to further "review" (85 N.J. at 308; Pet. App. 125a). The State Supreme Court (91 N.J. at 111-112, 134) unanimously found to the contrary:

> . . . Harrelson specifically and adamantly insisted that he never used those or any similar words or ever made the statement to "anyone at all on the face of the earth that [he] was unsure of Bello's test results". (Pet. App. 125a).

Weeks later, Harrelson sent a written report to the prosecution in which he concluded that he believed Bello's 1967 trial testimony was "true". 85 N.J. at 307. He had mistakenly believed that Bello had testified in 1967 that he was "in the bar." Thus his report meant the opposite of what it said since the 1967 trial testimony was an "on the street" story. The prosecution never contacted Harrelson to see why his later written conclusion was directly contrary to his original oral reports. Yet testimony from four former prosecution members and two journalists established firm prosecutorial awareness of the discrepancy between the oral and written reports and the significance of that discrepancy. The original information circulating in the Prosecutor's Office was that Bello had "failed" the lie detector test; then, inexplicably, it changed to Bello had "passed". This switch featured prominently in the decisions of Assistant Prosecutor Richard Thayer and County Investigator Richard Caruso to resign, and prompted Thayer's comment that "The case stunk and ... the behavior of the Prosecutor's Office stunk" (A. 9C2077; 8C2016). Only the mistaken written report was disclosed to the defense, despite specific requests for all polygraph information (Pet. App. 52a).

Compounding the error, the prosecution used that erroneous report to get Bello back to his original story. As Assistant Prosecutor Ronald Marmo unequivocally stated at trial (A. 21B2724-2725):

> Bello was confronted with [the written results], and this is what brought Bello back to the testimony which he gave at the initial trial.

In the prosecutors' own words, which they reiterated at the remand hearing and at oral argument below, they "confronted" Bello with the mistaken "report," told him that the "lie test" showed the on-the-street version must be true and he finally "broke" and returned to that story. (See Pet. App. 17a, citing the state courts; see also 85 N.J. at 315.)

At trial, the prosecutors told the court that if the defense asked Bello why he changed from "in the bar" to "on the street" they would bring out the polygraph results which ostensibly (but not actually) supported his original on-the-street story (Pet. App. 64a). The court ruled that if the defense questioned Bello about the circumstances of his latest return to his on-the-street version, that

would open the door to the lie detector results allegedly supporting that Bello version (his 1976 trial testimony), and to Harrelson's supporting testimony. As a result, the defense, unaware of the oral reports and of the misuse of the written report, had to avoid cross-examining Bello and police witnesses regarding the prosecution's effort to again change his story to suit their trial purposes (85 N.J. at 310 n.3). And the prosecution succeeded in restricting cross examination and in aborting a crucial defense argument in summation (A. 45A10674-75; Pet.App. 62a): Bello's 1976 "on-the-street" trial story was produced by the same prosecution pressure that had improperly prevailed in 1967.

A Verdict of Already Questionable Validity

Petitioners' protestations notwithstanding, the *Brady* violation relating to the only "eyewitness" was all the more significant in view of the thinness and tenuousness of the State's case. Their characterization of the trial evidence is, at the very least, misleading. They ignore the compelling proofs of respondents' innocence and make a series of conclusory statements about the evidence with absolutely no basis in the record. They claim, for example, that there was testimony "from eyewitnesses to the effect that the Carter vehicle, as well as Carter and Artis, were at and fled the scene." (Pet. 5). But the only alleged eyewitness identifying respondents at the scene was the notoriously unreliable Bello, and no witness identified the car. They totally misstate the nature of the motive "evidence" — never mentioning the question of race, yet their bizarre and ugly "racial revenge" argument was the entire basis of their "motive" argument at trial.

But argument is no substitute for the facts. According to the District Court, "Even at its strongest links, the government's chain of evidence [was] substantially called into question by [respondents]". (Pet. App. 74a) State's witnesses themselves gave one account on direct examination and a different one on cross; their testimony was unsubstantiated and contradicted by police reports and prior testimony, and had "improved" to the State's benefit from 1967 to 1976; vital documents were missing; documents supposedly "destroyed" ten years earlier suddenly reappeared; the surviving victims failed to identify respondents; and

all original descriptions (including Bello's) were "not even close" to Carter and Artis. Every element of the State's case was contradicted and disputed.

The original police reports from witnesses on the scene consistently decribed the perpetrators as two, thin-built, light-skinned Negroes, about the same height, (5'11"), no beards, one with a thin mustache, both wearing dark clothes (A. 17A3850, 29A6377, 30A6471, 31A6896). The description is not remotely close to the respondents, who were wearing light clothes, have a six-inch height difference, with Carter thick-set, 5'7", gleaming bald head, prominent goatee and very dark-skinned. Neither of the survivors identified respondents as the perpetrators, although both viewed them within hours of the shootings (Pet. App. 26a).

Petitioners' conclusory statement (Pet. 5, 6, 22) that the Carter car was described and identified at the scene as the getaway car, is a gross mischaracterization of the evidence, unsubstantiated by any police report or memorandum, and simply ignores the mass of trial testimony, even from the State's own witnesses, which acknowledged that no such event occurred; see District Court opinion (Pet. App. 66a-67a, 70a). Petitioners misstate Mrs. Valentine's testimony, which revealed the following: (1) Valentine did *not* identify the Carter car to the police at the scene and admitted on cross, that her 1967 testimony as to that *non*-identification was true: she was "not specifically identifying" the Carter car as the getaway car (A. 16A3507-3509); (2) she described a different model of car than the Carter car (there was also testimony that the Carter car was a different color); and (3) Valentine never identified respondents as the men she saw fleeing the scene.

It is also clear that no ballistics linked respondents to the crime. Contrary to petitioners' misleading statements (Pet. 5), the one shell and one bullet the police claimed they found in the Carter car were not "consistent with" or "of the same type" as the ammunition used at the scene, but had numerous and significant differences (Pet. App. 70a-71a). The shotgun shell was not allowed into evidence at the first trial because the trial court found it to be too remote in description to have probative value. This shell was, however, identical in every respect to a shell recovered by police from an earlier murder scene and which had disappeared

from that evidence. Moreover, the official complaint report, signed by the officer who allegedly found the bullet and shell in the Carter car, made no mention of such a discovery, which was negated also by fatal irregularities in the logging and tagging of the evidence. No weapons were ever recovered; no fingerprinting was allegedly done on any evidence; nor were respondents given paraffin tests.

The state's case had other major flaws.[6] There were bona fide alibi witnesses who were socializing with respondents on the night of the shootings. Their testimony made it impossible for respondents to have been at the scene when the crime occurred (Pet. App. 72a-73a) and, as the chief investigator told the grand jury, to have made the necessary clothing change (A. 29A6377). All the evidence showed that respondents' behavior, movements, and demeanor on the night of the Lafayette shootings were entirely normal and social and consistent with their innocence, and so utterly at odds with the frenzied deviousness demanded by the State's speculation of an elaborate and sinister conspiracy, as to be absurd.

For example, the prosecution had to explain why there was a third person (Royster) in the Carter car when it was stopped by the police shortly after the shootings and why there were only two men in the Carter car when it was stopped by the police twenty minutes later. Despite the absence of a single supporting witness, despite the testimony of Royster and others to the contrary, and despite the fact that all witnesses saw the getaway car fleeing in the opposite direction, the Prosecutor told the jury that Carter and Artis raced to a local bar, where they picked up Royster for alibi purposes and then drove casually around in the area. The proposition that the two perpetrators, fully aware they and their "distinctive" car had been witnessed at the scene, would then take

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[6] See also Pet. App. 66a-74a for a review of the totality of the circumstances. For example, the State's allegation that respondents' attorneys at the first trial (one of whom is now a State Superior Court judge) solicited a "false alibi" on behalf of Carter in 1967 is insupportable in the face of the record reviewed in some detail by the District Court (Pet. App. 71a-73a). Petitioners' claim that respondents gave "inconsistent" oral statements to the police is also vigorously disputed in the record (see Pet. App. 71a) and, in any event, was so inconsequential, it was not even argued to the jury. Petitioners' untenable claim of fabricated testimony on the part of Artis was likewise never argued to the jury (nor to the District Court).

pains to pick up a third man "as a decoy" and yet continue to drive around in the same car in the same vicinity and minutes later *drop him off*, the two perpetrators remaining in the same car and continuing to drive around, now closer to the crime scene, is preposterous, as even the police acknowledged to the original grand jury (A. 45A10658).

The prosecution's predilection for forcing the square pegs of its theory into the round holes of the facts is particularly evident in its racial revenge speculation. See Pet. App. 31a-50a. At the second trial (no motive evidence was offered at the first trial), the Prosecutor stated in open court:

> . . . the State contends the motive for [the] killings was that it was a *racial* killing in revenge for a killing committed earlier that same day. . . . It's a case that involves black people killing white people and the basis for that killing . . . is because of . . . *racial* revenge. (A. 6A1080-1082; emphasis added)

The District Court found the State's reference to and reliance upon this motive theory was a Due Process violation since it appealed to racial prejudice.[7] The Court analyzed the State's theory "in its most favorable light", "accepting [each element] as true and proven" and found it even on *that* basis constitutionally defective: "a thin thread . . . of largely irrelevant evidence and impermissible inferences" (Pet. App. 38a), based on respondents' race and unrelated to them as individuals; and none of this "irrelevant evidence" was "true and proven" in any event.[8]

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[7] Petitioners' claim (Pet. 9) that the State Supreme Court had rejected this argument ignores the fact that the three dissenters joined in *no* part of the majority opinion.

[8] The Court found that respondents had nothing but good and "cordial relationships with white people, socially and professionally" (Pet. App. 40a) and there was no evidence of any racial animosity toward whites in general, or the victims in particular. In addition, in order to sustain its theory, the alleged target/victim had to be prejudiced, but the evidence showed the contrary (Pet. App. 39a). The State had to eliminate robbery as the motive; yet there was evidence that pointed to an aborted robbery attempt (Pet. App. 37a, 39a n.5). Other areas of the State's theory also do not withstand scrutiny. The so-called "search for guns" (Pet. App. 40a-42a) was

(Footnote Continued)

The District Court considered it highly significant that respondents were released on the day of the Lafayette shooting without any charges, despite an alleged wealth of evidence against them that the State claims it had already amassed and, significant too, that the grand jury twelve days later exonerated respondents. This fatal flaw at the root of the State's case is detailed in the District Court opinion, Pet. App. 73a-74a.

Proceedings Below

Petitioners' implication (Pet. 9) that respondents slept on their rights and somehow delayed presenting their claims to the federal courts is baseless. *There never was a time in which the respondents were not in court seeking to overturn their convictions.* The case was vigorously pursued in state courts for six years (from 1976 to 1982), with argument before the appellate division, two arguments in the New Jersey Supreme Court, and a remand hearing lasting three weeks.[9] When new exculpatory evidence was found during the remand hearing (consisting of the file of County Investigator Richard Caruso, who had questioned many of the tactics and actions of the prosecution, had found considerable suppressed exculpatory information, and resigned due to dissatisfaction with the office)[10] respondents pursued still further state court appeals to develop that material. When they filed their federal

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nothing but a prosecutorial invention and distortion of innocuous record facts of a chance encounter between Carter and a former sparring partner who Carter had heard had stolen and sold, a year earlier, some hunting and target weapons from their training camp. This "search"—integral to and argued as a "proof" of the racial revenge motive speculation—was absolutely unrelated to the motive, as the events which the prosecution fashioned into a "search", began before the motive could have been formed in either respondent's mind.

[9] There were also hearings relating to testimony that some jurors during *voir dire* had concealed their prejudices against blacks and that others had been tainted by false considerations outside the evidence. This jury misconduct is another ground in the petitions for writs of habeas corpus, not ruled upon by the District Court.

[10] For example, the investigator's notes stated the following (A. 3F347):

> I demanded to be removed or expose. They said O.K. But I would never be allowed to reveal/testify as I was privy to Pros. case.

The notes cast further doubt on the already unreliable testimony given by Mrs. Valentine. The courts below did not cite or rely on material from the Caruso file.

habeas corpus petitions in 1985, the State argued that they had still not exhausted all their state court remedies on the Caruso issue and were premature in filing federal writs, which totally undermines the implication that respondents slept on their rights (Pet. 24-25). The prosecutors finally conceded exhaustion had occurred and stated they were prepared to argue the merits of respondents' summary judgment motion, which they proceeded to do.

Petitioners nowhere mention either the nature or number of the many other grounds asserted in respondents' habeas petitions – many involving further instances of suppression of exculpatory material and prosecutorial misconduct. As to Carter, nine grounds are still undecided, and as to Artis, thirteen. (These constitutional violations are described by the District Court at Pet. App. 29a-30a.)

Furthermore, petitioners nowhere describe the District Court holding that the racial revenge theory was an appeal to racism that also justified grant of the writ. According to the District Court (Pet. App. 43a, 48a):

> The inferential leaps made by the prosecutor are virtually impossible without the unstated appeal to the jury that it is perfectly reasonable to expect blacks to commit murder when one of their own is attacked. The fallacious premise of the argument becomes self evident if it is reversed and applied toward whites. Would a jury be permitted to conclude that a white defendant would have expressed such violent and indiscriminate rage without any evidence of personal racial animosity?
>
> * * *
>
> In sum, the prosecutor's theory invokes race for a purpose that has very slight or uncertain logical validity, and does so at a distinct risk of stirring racially prejudiced attitudes. *McFarland v. Smith*, 611 F.2d at 419.

The Third Circuit found it unnecessary to reach that question in the light of the *Brady* violation.

Opinion of the Third Circuit

The Third Circuit unanimously found that a classic *Brady* violation had occurred. First it cited this Court's decisions in *Bagley*

and *Giglio v. United States*, 405 U.S. 154 (1972), that evidence that would impeach a key witness is evidence favorable to the accused (Pet. App. 11a). Second, it concluded, as did all the reviewing courts, that the Harrelson lie detector results on Bello were favorable to, and should have been disclosed to, the defense. Third, it examined the question of whether materiality determinations made by a state court are subject to the presumption of correctness under 28 U.S.C. § 2254(d). Noting that no Court of Appeals' case held to the contrary and that all have concluded that materiality issues are mixed questions not subject to the presumption (Pet. App. 4a), the Court concluded likewise.

Since it was not bound by the presumption, the Court of Appeals considered anew whether the defense could have made effective use of the undisclosed Harrelson oral reports. Accepting the finding of all the state courts that the lie detector results were "importan[t]...in shaping Bello's testimony" (Pet. App. 17a), the Court concluded that the reports had to be material:

> Reduced to its essence, the issue comes to this: had the prosecution properly disclosed Harrelson's oral reports Carter would have been in a position to argue that the prosecution had persuaded Bello to return to the "on-the-street" version not because it was true, but because that is what the "lie detector" results demanded. This is more than mine-run cumulative evidence. (Pet. App. 18a)

Most significantly, the results could also have been used to undermine Bello's identification of the respondents, since the evidence directly affected his vantage point at the time of the shootings and thus "goes to the very heart of [his] testimony." The inconsistency as to where he was, was not cumulative and immaterial, since it affected "his opportunity and ability to identify Carter and Artis." (Pet. App. 18a-19a)

Since Bello was the only "eyewitness", his testimony was crucial: "under any reasonable characterization of the 1976 trial, the critical importance of Bello's testimony looms large and commanding." (Pet. App. 20a) Thus, since his testimony was critical and his credibility was a crucial issue, there is a reasonable probability that the result of the trial would have been different had the prosecution properly disclosed Harrelson's oral reports. The Court concluded that the writ was properly granted.

SUMMARY OF ARGUMENT

A finding by a state court that a *Brady* violation was not material cannot be a "factual" finding subject to the presumption of correctness under 28 U.S.C. § 2254(d). First such a determination is a difficult judgment call as to what *would* have happened at the trial if certain evidence had been disclosed, not what did happen at the trial. Under *Bagley*, that determination must involve the application of legal judgment to a factual situation and therefore materiality conclusions must be considered mixed questions. Second, the type of judgment as to prejudice under *Brady* and *Bagley* involves precisely the same question of prejudice as is presented when ineffectiveness questions are examined under the *Strickland* standard. Since this Court ruled in *Strickland* that determinations as to the prejudice of ineffectiveness are mixed questions not subject to the presumption, the same conclusion must follow as to materiality determinations made under *Bagley*. Third, examining whether a *Brady* violation was material involves the application of legal principles to the facts of a case, a task which this Court has always concluded involves a mixed question of law and fact; see *Sumner v. Mata ("Sumner II")*, 455 U.S. 591, 597 (1982). Fourth, weighing the effect of an error upon the trial is precisely what the harmless error doctrine requires, yet this Court has always held that harmless error determinations are mixed questions not subject to the presumption; see *Rushen v. Spain*, 464 U.S. 118, 120 (1983). Finally, in the *Brady* area, the issue of materiality is tied into the very question of whether a constitutional violation has occurred. Under no circumstances can that question be labelled a factual question since it would deprive the federal courts of their ultimate responsibility of defining and applying constitutional principles; see *Sumner II*, at 597.

If the presumption is not applied, then clearly the court below was correct in finding the violation was material. Certiorari should not be granted to apply the correct legal standard to the facts of this complicated, 92 volume, 20,000 page record. Bello was the key witness in this case, the only eyewitness identifying either respondent. The polygrapher's oral reports would have totally undermined his testimony since the erroneous lie detector results were the instruments used to have him change his testimony. The undisclosed information was critical in exposing the method by

which Bello's trial testimony was secured. The oral reports were also crucial in undermining his identification of respondents since that related to his vantage point ("in the bar" vs. "on the street").

The notice of appeal issue relating to John Artis is already before the Court in another case and becomes a superfluous issue if certiorari is denied on the merits under questions 1 and 2.

REASONS FOR DENYING THE WRIT

I. A State Court Finding that a *Brady* Violation is Not "Material" is Not a Factual Finding Subject to a Presumption of Correctness under 28 U.S.C. § 2254(d).

Petitioners' main contention here is that the presumption of correctness in the habeas corpus statute should apply to a state court finding that a *Brady* violation was not material, and that the Third Circuit was in error in deciding to the contrary. This Court has examined the question of what determinations by the state courts are subject to the presumption of correctness in no less than eleven cases in the past seven years: *Cuyler v. Sullivan*, 446 U.S. 335 (1980)(whether lawyer engaged in multiple representation is mixed question not subject to presumption); *Sumner v. Mata*, 449 U.S. 1981)(suggestive pretrial identification may be mixed question): *Sumner v. Mata*, 455 U.S. 591 (1982)(suggestive identification is mixed question but underlying factual questions entitled to presumption); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (questions underlying voluntariness of guilty plea entitled to presumption); *Maggio v. Fulford*, 462 U.S. 111 (1983)(competence to stand trial is factual issue, subject to presumption); *Rushen v. Spain*, 464 U.S. 114 (1983) (whether jurors deliberations were biased is question of fact); *Patton v. Yount*, 467 U.S. 1025 (1984) (individual juror's bias is factual question); *Strickland v. Washington*, 466 U.S. 668 (1984) (effectiveness of counsel is mixed question, not subject to presumption); *Wainwright v. Witt*, 469 U.S. 412 (1985) (jury bias is question of fact); *Miller v. Fenton*, 106 S. Ct. 445 (1985) (voluntariness of confession is question of law); *Vasquez v. Hillery*, 106 S. Ct. 617 (1986)(absence of blacks on grand juries was factual question entitled to presumption).

These decisions have laid out the basic principles which apply in this area: questions of primary, historical fact are subject to the presumption as well as issues dealing with the credibility of

witnesses, *Cuyler, supra*, 446 U.S. at 342. At the other extreme, the application of legal principles to the facts and the actual determination of whether a constitutional violation occurred involve legal conclusions or mixed questions and are therefore not subject to the presumption. *Sumner, supra*, 455 U.S. at 597. The question of materiality under *Brady*, involving as it does the application and definition of a constitutional standard, falls so clearly on the "mixed question" side of the line as determined by this Court, that there is no basis for the grant of certiorari to consider that question.

In the first place there is absolutely no conflict in the Circuits on this issue. Petitioners fail to point out that every Circuit that has considered the matter has concluded that materiality is a mixed question of law and fact and not subject to the presumption, as the Court of Appeals noted below (Pet. App. 14a). See *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 458 (1986); *Chaney v. Brown*, 730 F.2d 1334, 1345-46 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 601 (1984); *Ruiz v. Cady*, 635 F.2d 584, 588-89 (7th Cir. 1980); *Davis v. Heyd*, 479 F.2d 446, 451 (5th Cir. 1973). See also *Chaney v. Lewis*, 801 F.2d 1191, 1193, 1195 (9th Cir.1986) (Kennedy, J. on panel) (State's failure to preserve exculpatory evidence was mixed question of fact and law).

Indeed there is not a single vote in a reported federal case to the contrary—unlike the situations in *Miller v. Fenton*, 106 S.Ct. 445, 449 (1985) and *Wainwright v. Witt*, 469 U.S. 412, 417 (1984), where the conflicting holdings among the various circuit courts figured specifically in this Court's reasons for granting certiorari.[11]

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[11] Petitioners' reference to a contrary single dissenting vote in *Davis v. Heyd*, 479 F.2d 446, 454 (5th Cir. 1973) (Coleman, J., dissenting) and the district court decision in *Mixon v. Attorney General*, 583 F.Supp. 190 (D.S.C. 1982) is simply wrong. Aside from the fact that conflicts created by dissenting votes or district court decisions are not a basis for the grant of certiorari under this Court's rules (Sup. Ct. Rule 17), the dissenting vote in *Davis* focused on whether a state court finding that two statements made by a witness were inconsistent with each other, not whether materiality determinations generally are fact questions subject to the presumption. In *Mixon*, the district court applied the presumption only to the facts underlying the *Brady* issue and concluded on its own that the new evidence "would not have affected the result." 535 F.Supp. at 195. The case does not stand for the proposition offered by petitioners.

This unanimity is understandable. The question of whether a *Brady* violation is material requires the exercise of careful judgment by a reviewing court as to what use the defense could have made of the withheld evidence had they known about it at trial. As this Court said in *Bagley* (105 S. Ct. at 3384):

> The reviewing court should assess the possibility that such [adverse] effect [on the outcome] might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been mislead by the prosecutor's incomplete response. (plurality opinion of Justice Blackmun)

But stating that a reviewing court must attempt to reconstruct how the trial would or might have gone — and recognizing how difficult a task this is — is simply another way of saying that the reviewing court must use *judgment* on what *might* have happened or *would* have happened. It is not reconstructing what *did* happen at the trial. The problem of materiality, in that light, is clearly a question of the application of the law to the facts, that is, a mixed question of law and fact, to which the presumption does not apply.

Appellate courts and federal courts on habeas corpus may defer, as they always do, to the conclusions of trial courts closer to the actual events. State court judgments on the law are never ignored by federal courts and they were certainly given great weight here. (See, *e.g.*, Pet. App. 15a-21a, 23a-24a, 61a-65a.) But the application of the statutory presumption is much stronger medicine since it precludes any contrary conclusion by the federal courts, except under circumstances specified in Section 2254(d). (It must be noted that respondents do indeed argue—and argued below—that two of the exceptions, (d)(6) and (d)(8), apply. See last paragraph of this Point.)

Furthermore, this Court in *Strickland v. Washington*, *supra*, held that the statutory presumption does not apply to ineffectiveness of counsel claims, including both the "performance and prejudice components," 466 U.S. at 698. "Ineffectiveness is not a question of 'basic, primary or historical fac[t],' " quoting from *Townsend v. Sain*, 372 U.S. 293, 309, n.6 (1963). To determine

whether a counsel's performance prejudiced the defendant, reviewing courts must apply the following legal test, which this Court has specified is the "governing legal standard":

> ...the appropriate test for prejudice finds its roots in the test for materialty of exculpatory information not disclosed to the defense by the prosecution...The defendant must show that there is a reasonable probablity that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694, 695. In *Bagley* this Court applied the same test of prejudice to materiality determinations after the failure to disclose exculpatory evidence (105 S. Ct. at 3384):

> We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

It follows that since the same "legal standard" is applied in both ineffectiveness and *Brady* cases, and the same judgment by a reviewing court must be applied to both — were the deficiences sufficient to undermine confidence in the outcome — then materiality-prejudice is, by this Court's definition, the same as ineffectiveness-prejudice. They are both judgment calls by a reviewing court as to what might have happened rather than what did happen. As such they are both not historical facts, but mixed questions of fact and law, not subject to the statutory presumption.

Viewed another way, determination of whether a *Brady* violation was material involves the application of the legal standard (*i.e.*, "undermines confidence in the outcome") to the particular facts of the case. See concurring opinion of Justice White in *Bagley*, 105 S.Ct. at 3385. Such a function clearly involves the use of legal

and constitutional judgment, as this Court emphasized in *Sumner v. Mata* [II], 455 U.S. 591, 597 (1982):

> the ultimate question as to the constitutionality of the pretrial identification procedures. . . . is a mixed question of law and fact. . . . In deciding this question, the federal court may give different weight to the facts as found by the state court and *may reach a different conclusion in light of the legal standard.* (emphasis added)

The "ultimate question as to the constitutionality" of the prosecutor's action in not revealing exculpatory evidence is precisely what a materiality determination is. Federal courts may – indeed are obligated to – examine this issue on their own and may "reach a different conclusion" than the state court.

The same conclusion follows from this Court's analysis in *Miller v. Fenton*, 474 U.S. 104 (1985). This Court suggested that one way of distinguishing questions of fact from questions of law is through the process of allocation. That is, which judicial actor is "better positioned to decide the issue in question." When historical facts or the credibility of witnesses are at issue, the trial court is certainly better positioned.[12] But when the question is what could or might have happened if certain evidence had been produced, the trial judge is not in a unique position to decide the issue, any more than he is better qualified to decide what would or might have happened if the defendant's lawyer had taken certain actions. The judge's role in both situations is exactly the same: he is weighing events that did not happen and trying to make difficult judgments as to what would have happened. There is simply no principled way to distinguish ineffectiveness-prejudice issues from materiality-prejudice issues, as this Court has emphasized by constantly equating the two situations. If one is a legal question (or a mixed question) then the other is as well.

This result is also required by this Court's "harmless error" cases. In some situations, a court must, after determining whether a constitutional violation occurred, apply a second-tier analysis – it must then determine whether there must be automatic reversal

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[12] Thus, petitioners' reliance on the passage they quote from *Miller* (Pet. 16) is misplaced, as there is no dispute here that a trial court is "better positioned" to determine historical facts or the credibility of witnesses.

or whether the error was harmless. See *Rose v. Clark*, 106 S. Ct. 3101 (1986). It has been the well-established rule that "harmless error" determinations involve mixed questions of law and fact, not subject to the presumption. See *Rushen v. Spain*, 464 U.S. 118, 120 (1983): "The final decision whether the alleged constitutional error was harmless is one of federal law." If the decision is one of federal law, it must surely be one of law and not one of fact. See also *Lacy v. Gardino*, 791 F. 2d 980, 986 (1st Cir. 1986) (state finding of harmless error not entitled to presumption of correctness); *McKenzie v. Risley*, 801 F.2d 1519, 1523 (9th Cir. 1986) (harmless error determination not subject to presumption).

That is true despite the fact that the trial judge may have heard the evidence and determined the credibility of witnesses and may have some notion of how the error affected the proceedings. Nevertheless, weighing the *effect* of the error in light of the entire proceedings and determining whether the evidence was "overwhelming" and therefore whether the error was "harmless" has never been considered the special function of the trial judge binding on reviewing courts and therefore the type of decision that is subject to the presumption of correctness. Since the type of evaluation and judgment made by the courts on a *Brady* evaluation, *i.e.*, what was the effect of withholding the exculpatory evidence upon the entire trial, is precisely the same type of judgment made in harmless error situations, the unequivocal holding of this Court in *Rushen* that harmless error determinations involve legal evaluations must carry over to materiality evaluations in the *Brady* context as well. It is exactly the same type of question. Indeed, in *Bagley*, the standard for materiality of *Brady* information establishing the knowing use of perjured testimony is precisely the harmless error test, 105 S.Ct. at 3382, n.9 . If one standard for materiality under *Brady* is a legal standard, then obviously the other standard (reasonable probability) must be one as well.

In other situations, the effect of the error is inextricably tied into the question of whether constitutional error occurred at all. There, the courts do not engage in a two step analysis, but only a single level of inquiry: was the error so serious that the trial became fundamentally unfair. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974)(prosecutor's remark was not so serious as to make trial "so fundamentally unfair as to deny him due process");

see also *Darden v. Wainwright*, 106 S. Ct. 2464 (1986)(prosecutorial remarks); *Holbrook v. Flynn*, 106 S. Ct. 1340 (1986)(use of armed guards in court). In this group of cases, just as in the ineffectiveness and *Brady* cases, the errors do not reach constitutional dimensions unless and until a prejudicial point is reached. Put another way, the definition of the constitutional error involves an evaluation of the prejudice component: unless it was seriously prejudicial, there is no constitutional error.

It follows that the determination of whether there was prejudice clearly must involve a legal evaluation. If the federal courts were precluded from questioning the prejudice or materiality component of the error (which are identical in this context) because they are considered "factual," then the federal courts would be barred from their most important function, actually defining what constitutes a constitutional violation. Since under *Sumner v. Mata*, 455 U.S. 591, 597 (1982) "the ultimate question as to ...constitutionality ...is a mixed question", a *Brady* materiality determination must be such a question, as weighing and determining that issue is the "ultimate [constitutional] question."

Thus weighing the effect of an error (by counsel who may be ineffective, or by the withholding of exculpatory evidence) is so much a matter of the application of judgment, and in particular of constitutional judgment, that the presumption cannot possibly be applied. Nor did Congress intend to give that kind of deference to state court determinations in this area since it would amount to a fundamental ousting of the historic responsibility of the federal courts to define the scope of constitutional error.

It must also be noted that respondents have always urged that the presumption should not be invoked since the Section 2254(d)(6) and (8) exceptions apply here. Thus respondents asserted, and submitted considerable evidence to show, that they did not receive a fair and adequate hearing in state court and that factual determinations were not fairly supported by the record (Pet. App. 59a, 64a). The courts below did not consider whether either exception should apply. Even if this Court reversed the Court of Appeals on the issue of whether materiality determinations are subject to the presumption, it should still not be invoked until the application of the exceptions is determined by the lower courts.

II. The Third Circuit Finding of Materiality Is Amply Supported in the Record

Petitioners are asking this Court to re-evaluate the 20,000 page record of this case, alleging that the Circuit and the District Court's evaluation of the record was so "inadequate" as to merit this Court's intervention (Pet. 19, 23). That is not a basis for the grant of certiorari. As members of this Court have emphasized numerous times, "when no new principle of law is presented, we should generally leave undisturbed the decision of a court of appeals that upon a particular set of facts of any case habeas corpus relief should be granted," *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Justices Stewart and White, concurring). See also *United States v. Hasting*, 461 U.S. 499, 516-17 (1983) ("This Court is far too busy to be spending countless hours reviewing trial transcripts to determine the likelihood that an error may have affected a jury's deliberations.") (Stevens, J., concurring)

Furthermore, this Court should not grant certiorari, as the facts of this case are simply so idiosyncratic that it is highly unlikely that any comparable situation can arise. How often will the only eyewitness to a homicide change his testimony because he is "mistakenly" told that his lie detector results required a change in his testimony?

There is no doubt that the undisclosed evidence was crucial impeachment material under well-established precedents in this Court. See *e.g.*, *United States v. Bagley*, 105 S.Ct. 3375, 3380 (1985): "Impeachment evidence, however, as well as exculpatory evidence falls within the *Brady* rule."

In *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985), a writ was granted on *Brady* grounds when impeachment material (a prior statement that the witness did not see the perpetrator's face) had been withheld from the defense. Even though the eyewitness testimony of the other identifier was not undermined, the writ was granted:

> ...our experience at the bar has been that positive identification by two unshaken witnesses possesses many times the power of such an identification by one only, and that the destruction by cross-examination of the credibility of one of its two crucial witnesses—even if the other remains untouched—may have consequences for the case extending far beyond the discrediting of his own testimony.

But in this case, Bello was the *only* eyewitness, and the impeachment material was far more explosive: evidence that erroneous lie detector tests were fed to Bello convincing him to change his testimony in a way favorable to the state.

See also *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986) (evidence undermining eyewitness testimony was material and required grant of habeas writ); *Bagley v.Lumpken*, 798 F.2d 1297 (9th Cir. 1986) (evidence impeaching key government witness was material); *United States v. Severdija*, 790 F.2d 1556 (11th Cir. 1986) (exculpatory statement not disclosed: Brady violation found); *United States v. Srulowitz*, 785 F.2d 382 (2d Cir. 1986) (insurance file which could have contradicted government witness was material: Brady violation found).

Petitioners' argument — that the undisclosed information was not material to guilt or innocence — is contrary to the record, and is eloquently and definitively laid to rest by the State Supreme Court Dissent (Pet. App. 124a-132a), the District Court (Pet. App. 50a-74a), and the Court of Appeals (Pet. App. 3a-21a) — all of which expressed grave doubts as to the propriety of the verdict in light of the undisclosed evidence.[13]

A. Bello's Testimony Was Critical

Petitioners' claim (Pet. 19) that Bello's testimony was inconsequential to the verdict is stupefying. Contrary to petitioners' assertions, the Court of Appeals did not conclude *ex nihilo* that Bello's testimony was of critical importance. The New Jersey Supreme Court unanimously declared Bello's testimony was "prominent" and "critical" to the State's case. *State v. Carter*, 85 N.J. 300, 305. More than one third of the State's summation related to his testimony. Bello was the only "eyewitness" who claimed respondents were at or near the scene. Without his testimony, the victims' non-identification of respondents and the inapposite descriptions of assailants would have been insurmountable. As outlined in the *Statement of Facts* above and in the District Court opinion (Pet. App. 65a-74a), the State's case was weak and thoroughly contradicted.

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[13] Petitioners omit altogether any mention of the blistering dissent by three justices on the New Jersey Supreme Court, and give the false impression that (a) there was unanimity among the state courts and (b) that the federal courts are somehow improperly meddling with an uncontroversial state judgment.

Bello's all-important credibility depended on the prosecution explaining to the jury why in the 1974-1976 period, he had told – under oath – so many different versions of where he was and who and what he saw. Its argument was that Bello was manipulated by various journalists, promoters and lawyers to tell his "in the bar" story, but that he finally decided that he had to tell the truth. Therefore he returned to the "on the street" story which he had told at the first trial.

Respondents, however, tried to show at trial that Bello was such a malleable witness and was subject to such a variety of pressures by the prosecutors that the reason for his return to the "on the street" story had nothing to do with the truth; rather his final switch was totally the result of the prosecutors' actions. What respondents did not know at trial was that there existed in the prosecutor's possession the most devastating evidence to support that theory – namely that the reason Bello changed his testimony for the final time to "on the street" was that the prosecutors confronted him with an erroneous "lie test" that said one thing but meant another, and using that error, caused him to return to the story they wanted.

B. Material Uses of the Undisclosed Polygraph Information

As the Court of Appeals pointed out, the state courts "made ample findings of fact . . . that conclusively demonstrated the importance of the polygraph results in shaping Bello's testimony at the 1976 trial." (Pet. App. 17a) Indeed, every New Jersey court accepted as a fact that the lie detector test was instrumental in that regard. Had respondents known the true state of affairs, they would have been able to make devastating use of the material. As the District Court (Pet. App. 62a-63a) explained:

> If counsel for [respondents] had the relevant information, they would have had the means to convince the jury that Bello selected one of several versions, possibly all untrue, merely because he mistakenly believed it had been confirmed by a polygraph test.

Thus:

> ... they could have argued not only that the choice [of which story to tell] was predicated upon facts submitted by the prosecution, but that those facts were false. The jury could well have concluded then that if Bello had been

> told that the "in-the-bar" version or some other version was found true by the polygrapher, he would have told that version. From those circumstances the jury could have concluded that Bello's choice of the final version was not a decision based on truth but rather one influenced by a premise, and a false one at that, furnished by the prosecution.

Respondents could also have used this information for the following purposes ignored by petitioners: (1) Two prosecution members, who were witnesses themselves, could have been cross-examined about their use of the written report to persuade Bello to change his mind (Pet. App. 62a). (2) "The defense could have attacked the credibility of these two witnesses for concealing the polygraphist's conclusion that Bello was in the bar" (*id.*). (3) A full hearing could have been held during trial to show how Bello was confronted with an erroneous result. His entire testimony may well have been stricken (Pet. App. 17a). (4) The main prosecution theme—that Bello was manipulated away from "on the street" by people allegedly associated with the defense—would have been undermined (Pet. App. 60a).

In short, disclosure of the use of the erroneous polygraph test results would not only have given the defense an opportunity to challenge Bello's credibility, it also resolved the key question of the reason for the final switch from "in the bar' to "on the street": it exposed the related prosecutorial misconduct and undermined the prosecution attack on defense witnesses. When Assistant Prosecutor Marmo asked Bello why he changed from an "in the bar" story in the summer of 1976 to "on the street" at trial in October 1976, he answered, "Because it was true". It was crucial to the defense to counter this by showing that the final switch was made because of the prosecution's use of an erroneous polygraph report which the prosecution knew said the opposite of what the polygrapher had really found.[14] See District Court discussion, Pet. App. 63a.

Moreover, as the New Jersey Supreme Court Dissent, the District Court and the Court of Appeals all pointedly remarked, the

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[14] As to the use of the erroneous report, the prosecutors' own statements are unequivocal (see Statement of Facts, *supra*). Since respondents' *Brady* point depends only on the fact that the lie detector test was used in the manner described and was the "proximate cause" of Bello's change in testimony, and not whether the prosecutors' actions could be characterized as coercive or deceitful, the state court findings on lack of coercion and "intentional" misrepresentation (Pet. App. 99a) are irrelevant, as the Court of Appeals correctly noted (Pet. App. 16a-18a).

discrepancy of where Bello was and what he was doing before, during and just after the shootings "goes to the very heart of his testimony". (Pet. App. 18a) In upholding the admissibility of Bello's trial identification, the New Jersey Supreme Court majority seemingly agreed:

> Even if bringing the car to the scene was suggestive, the totality of the circumstances indicates that the identification was reliable. *Bello had time to view the killers as they walked toward him on a well-lit street. It is likely that he was attentive* since he thought the two were detectives and he himself was involved in a crime being committed down the block.

(Pet. App. 120a; emphasis added) But in his Harrelson version, Bello was in the bar, which is contrary to the trial story described above and goes directly to the unreliability of the identification. The Dissent pointed out the obvious: where Bello was

> goes to the opportunity and ability Bello had to identify defendants. Chances are that what one sees from a vantage point within a tavern as all hell breaks loose is not going to be the same as what one sees as one strolls up the sidewalk after the carnage. The defense attacks on Bello's "on-the-street" story would have proceeded from a wholly different perspective and in an entirely different framework.[15] (Pet. App. 131a)

The *Wade/Stovall* eyewitness identification hearing likewise would have "proceeded from a wholly different perspective", since Bello's capacity to view the perpetrators was so different (Pet. App. 62a).[16]

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[15] See, e.g., *United States v. Downing*, 753 F.2d 1224, 1230-1232 (3rd Cir. 1985), listing factors affecting reliability of eyewitness identifications – all of which apply adversely to Bello; *inter alia*, the negative effect of stress on the accuracy of identifications.

[16] Respondents also could have demolished the particulars of Bello's trial identification of respondents, since he told Harrelson that he "did not know" who the two black men were, but came to believe they were Carter and Artis because he "was told later" the two men brought to the scene by police "were Carter and Artis" (A. 4E616-618). This flatly contradicts Bello's trial testimony in which he claimed to recognize Carter immediately, having seen him twice previously. Indeed, the trial court ruled that Bello's alleged prior knowledge of Carter was "crucial" and "pivotal" in admitting Bello's identification in 1976 (A. 19A4168, 4181). Had the court known Bello told the polygrapher he did not recognize Carter, it is inconceivable Bello's identification would have been admitted.

The Harrelson episode thus could have been used to totally demolish the alleged identification.

In view of the above, it cannot be seriously argued that the undisclosed *Brady* information was merely "of only a cumulative impeaching nature". (Pet. 19)

C. *Petitioners' Meritless Arguments Regarding The Polygrapher's Testimony*

Disregarding the material uses the defense could have made of the *Brady* information, respondents base their arguments on their claim that the jury would necessarily have been apprised "that an eminent polygrapher entertained 'no doubt at all' that Bello was truthful when he identified the defendants as the murderers." (Pet. 8, 21) There are four answers to this assertion. First, Bello never identified *anyone*, let alone Carter and Artis, as the murderers (see discussion at Pet. App. 64a, regarding the State Supreme Court majority's misstatement of this and other significant facts). Second, the notion that polygraph results of Bello have any meaning is preposterous. Bello had an undisputed history of "passing" polygraphs, only to be discovered later to have been lying. And, the various Bello exams, marked by irreconcilable results (*e.g.* Harrelson: Bello in the bar; Arther: Bello on the street; see Pet. App. 130a-131a) also conclusively show that if there is any validity to polygraphy, Bello is not a fit subject to be tested.[17]

Third, petitioners ignore the District Court's solution (which they conceded at argument below, was a viable one), that the polygraph evidence would have been limited to purposes of credibility, avoiding the necessity of having even the results (let alone polygrapher's testimony) presented to the jury (Pet. App. 65a) Fourth, even if the results were admitted, it hardly follows that Harrelson's "beliefs" would have been. Petitioners, like the Supreme Court majority, casually blur the distinction between polygraph results and the polygrapher's groundless, unscientific conjecturing as to guilt or innocence of people he never tested.

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[17] Other factors adversely affecting the fitness of a subject for polygraphy also apply to Bello: serious head injuries; alcoholism, which Bello acknowledged impaired his memory (Bello had been drinking on the night of the crime); the

(Footnote Continued)

Even if all rules of evidence were suspended and Harrelson were permitted to speculate about the culpability and veracity of people he had not tested – that, as Harrelson stated at the hearing, he believed Carter and Artis were the murderers because Bello had told him that, while standing in the hedge, he saw Carter and Artis armed and backing out the front door of the Lafayette Bar[18] – then he would have looked ridiculous and been impeached by his own contemporaneous notes (A. 4E616-633), which show that Bello told him none of these things; yet Harrelson swore he based his opinion on these same notes, and that they were accurate (A. 2C437)! Nor would the reliability of his opinions have been enhanced if the jury were to learn that he concluded (in his written report) that Bello's 1967 testimony was true, even though he didn't have a clue as to what that testimony was.[19]

III. The Notice of Appeal Issue is Superfluous and Not Worthy of a Grant of Certiorari.

The petition's third question relates to the State's admitted failure to file a Notice of Appeal on the order granting the writ to co-respondent John Artis. Petitioners excuse themselves on the ground that they were in such a hurry to appeal the Carter writ (in order to block his release order) that they did not deal with the separate Artis order (Pet. 24-25). And they conceded below that they did

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length of delay between the event and the testing (10 years), etc. The other polygraph test petitioners refer to (Pet. 22) was meaningless for additional reasons. Bello was never asked if he was in or out of the bar, or if he saw any gunmen; nor was he asked anything about Artis, or the involvement of others. As such, his answers were consistent with his various previous stories.

[18] Aside from the rudimentary problem that there was no hedge outside the Lafayette Bar, this novel scenario, which surfaced for the first time at the remand hearing – five years after the test and the trial – is contrary to *all* of Bello's versions, including his trial testimony, wherein he claimed he saw respondents, not backing out of the bar, but strolling around the corner of the building outside on the street afterwards.

[19] A 41-minute phone call between prosecution and Harrelson in the time between his oral and written report would also have taken on greater significance, especially when tied to Harrelson's admissions to a reporter about prosecution efforts to change his opinion (A. 11C2567-2569), and by testimony showing his opinion was influenced also by false, racist remarks by the prosecution (A. 2C501-507); *e.g.*, that Carter had allegedly refused to be polygraphed by Harrelson because his skin was white. And his testimony would have been

(Footnote Continued)

not file a notice as to Artis because of the uncertainty of his status at that time (Pet. App. 9a). Petitioners also misstate the facts and are simply wrong in asserting (Pet. 28) that Artis' attorney was served with a notice of appeal at the November 8 hearing or at any time. (See February 10, 1986 letter and affidavit of Artis' attorney filed with the Court of Appeals. As the Exhibits were omitted from Petitioner's Appendix, they are reproduced here at Appendix A). Petitioners' claim that Artis abandoned the jurisdictional issue is also belied by counsel's Notice of Appearance which specifically preserved it (Pet. App. 213a).

This Court has granted certiorari in a case involving a related issue (not naming a specific appellant in a Notice of Appeal in a class action context) in *Torres v. Oakland Scavenger*, Dkt. No. 86-1845 (October 13, 1987). But there is no reason to hold this case for the decision in *Torres* and certainly no reason to grant certiorari in this case on that issue. Artis is in precisely the same position as Carter on the merits of the case. If certiorari is denied with respect to questions 1 and 2, then the the writs of habeas corpus must be granted in any event and the Notice of Appeal issue becomes moot and irrelevant. There is no basis for granting the writ or delaying action on the petition on the basis of the third question alone.

CONCLUSION

For the reasons stated above, the writ of certiorari should be denied.

Dated: New York, N.Y.
December 14, 1987

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devastated by other polygraphers who would say that the scope of polygraphers' competence is extremely narrow (*i.e.*, is the subject intentionally lying, or not) (A. 4C883-884). See also Pet. App. 130a-131a.

APPENDIX

APPENDIX A

STEEL & BELLMAN, P.C.
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February 10, 1986

Ms. Sally Mrvos
Clerk
United States Court of Appeals
for the Third Circuit
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: John Artis v. Dietz, et al.
No. 85-5735

Dear Ms. Mrvos,

I am in receipt of the Reply of Respondents to the Motion of Petitioner-Appellee John Artis to Dismiss Appeal in the above matter. I write this letter in response to this Reply. I am also enclosing a short Affidavit, as the Response raises certain factual questions which should be answered.

Counsel for respondent attempts to justify the failure to include John Artis' name in the body of the Notice of Appeal and the failure to state that respondents were appealing from the District Court's separate grant of the petition as to Artis as well as the grant of the petition as to Carter and the order releasing Carter on the ground of excusable neglect. Respondents, however, cite no case law which would permit the making of such an argument, more than 60 days after the order to be appealed from was filed. Indeed, the case law, as set forth in my letter of January 22, 1986 is uniformly to the contrary.

Case law does exist, of course, wherein under certain circumstances notices of appeal from district court orders involving multiple

parties of multiple orders have been read liberally to allow a particular appeal against an additional party to go forward or to allow the appellate courts to consider multiple orders on appeal. There is, however, no basis upon which the Notice of Appeal in this case can be liberally construed to include an appeal against John Artis.

Respondents' counsel has admitted in his Affidavit to this Court that the Notice was drawn up by an attorney in the Prosecutor's office who omitted Artis from the body of the appeal because at the time he drew up the Notice of Appeal, he did not know whether the district court was going to immediately grant a writ as to Artis. Affidavit of John Goceljak, par. 14. Thus, the Prosecutor's Office did not intend to have the Notice of Appeal give Artis notice that respondents were appealing as to him. Moreover, a Notice of Appeal was never served upon counsel for Artis. See Affidavit of Lewis M. Steel, par. 2.

After the district court, with the consent of respondents' counsel, entered an order granting Artis' writ, respondents, if they wanted to appeal the Artis order, should have added the granting of Artis' writ to the body of the Notice of Appeal which the Prosecutor's Office had already prepared or prepared a second Notice of Appeal with regard to Artis. Having failed to take either of these actions, respondents should not be allowed to argue that the Notice of Appeal which they did file should be read in a manner which was inconsistent with their own intent at the time they prepared the Notice. Thus, this case is not governed by *Gooding v. Warner Lambert Co.*, 744 F.2d 354, 357 (fn.4) (3d Cir. 1984) where the Court pointed out that it was clear that the intent of the notice in question was to cover both a summary judgment order dismissing the action as well as a prior order dismissing a restitution claim.

Instead, this case comes squarely within the framework of *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977) wherein this Court stated:

> But in any case, the notice of appeal must conform to the requirement of Rule 3(c), F.R.App.P. that it "shall designate the judgment, order or part thereof appealed

> from." When an appeal is taken from a specified judgment only or from a part of a specified judgment, the court of appeals acquires thereby no jurisdiction to review other judgments or portions thereof not so specified, or otherwise fairly to be inferred from the notice as intended to be presented for review on the appeal.

Elfman Motors, Inc., like this case, involved multiple parties. There, as here, a notice of appeal was filed which stated that the appeal was from district court orders with regard to certain of the defendants. The notice in *Elfman* did not mention another court order which granted summary judgment to two of the other parties. Moreover, in *Elfman*, as in this case, the notice of appeal was not served on counsel for these additional parties.

Under all these circumstances, the Notice of Appeal in this case should not be read to include Artis. A ruling which would include Artis in this appeal, in effect would totally vitiate the requirement of Rule 3 in multiple party cases, and would mean that virtually any appeal against one prevailing party should be read as an appeal against all parties, no matter what the notice states.

A copy of this letter has been sent to counsel for respondents, as well as counsel for Carter, and an affidavit of service is also enclosed.

Respectfully submitted,

s/ Lewis M. Steel
Lewis M. Steel

LMS:PC
Enclosures:
Letter, original and three copies
Affidavit and Affidavit of Service
cc. Joseph Falcone, Esq.
Attn: John P. Goceljak, Esq.
Myron Beldock, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN ARTIS, No. 85-5735

AFFIDAVIT

Petitioner-Appellee,

—against—

CHRISTOPHER DIETZ, et al.,

Respondents-Appellants

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

LEWIS M. STEEL, being duly sworn, deposes and says:

1. I am the attorney for John Artis and submit this Affidavit in response to the Affidavit of respondents' counsel, John P. Goceljak, dated February 4, 1986.

2. Mr. Goceljak, in par. 17 of his Affidavit, states that after the district court completed the proceedings on November 8, 1985, "counsel for respondents provided conformed copies of the already filed Notice of Appeal [the only Notice of Appeal filed in this case] to counsel representing petitioners at their counsel table." I represented petitioner Artis at the November 8, 1985 hearing. At the conclusion of the hearing, I moved away from the petitioners' counsel table in order to express my congratulations to petitioner Carter and to shake the hands of many friends in the courtroom.

At no time on November 8, 1985 was I served with a copy of respondents' Notice of Appeal, nor did respondents serve me with the Notice at any time thereafter.

/s Lewis M. Steel
Lewis M. Steel

Sworn to before me this
10th day of February, 1986

/s Richard F. Bellman
Richard F. Bellman
Notary Public, State of New York
No. 31-4607158
Qualified in New York County
Commission Expires March 30, 1987